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THE TRANSFORMATION OF AMERICAN  
BUSINESS DISPUTING: A SKETCH OF THE  
WISCONSIN PROJECT

by

Marc Galanter, Stewart Macaulay, Thomas Palay, Joel Rogers  
University of Wisconsin - Law School

March 1991

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The Transformation of American Business Disputing: A Sketch of  
the Wisconsin Project

Marc Galanter, Stewart Macaulay, Tom Palay, Joel Rogers\*

**Introduction**

The Disputes Processing Research Program (DPRP) at the University of Wisconsin has recently embarked on a major study of changes in American legal practice. This study concentrates on the organization and delivery of legal services to business clients, and determinants of business demand for legal services. It seeks to describe and explain what now appears to be a qualitative transformation in business disputing and use of law that has occurred over the last two decades.

We believe the research will make a major scholarly contribution to our understanding of law, lawyers, and business governance in the United States, that it will clarify and enrich

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\*The authors are the principals in the Business Disputing Group at the University of Wisconsin. As in all reports coming out of this project, names are listed alphabetically, with no priority of authorship implied. This report also covers the work of our collaborators: Terence Dungworth of the Institute for Civil Justice, John Esser, Lane Kenworthy and Bill Humphries.

public discussion of many important policy issues concerning the role of law and lawyers in American society, and that it will be richly suggestive for assessment of comparable trends in other societies.

The present document reports on current and projected research activity, and indicates how we see the different parts of the project fitting together. Our discussion is divided into five parts. In the first ("Background and Goals"), we situate the project intellectually, and indicate its general ambitions. In the second ("Changes in Business Governance and Use of Law"), we indicate some of the dimensions of the transformation that provides our central focus. In the third ("Structure"), we outline both current and projected component studies of the project, indicating for each the specific direction of research, expected product, and progress in securing funding to support the work. In the fourth ("Who Cares?"), we argue for the intellectual and practical importance of the effort. A brief conclusion follows.

## Background and Goals

What interests us most generally is the use of law in the governance of the American economy, and how that has changed over the past two decades. To gain partial access to this very large question, we have chosen to concentrate on the use of law by American business firms. Consistent with the "law in action" approach of generations of Wisconsin legal scholarship, we are less interested in the formal extent or content of legal doctrine than in the instrumental use of law by strategic social actors. A focus on business actors is recommended both by the fact that business is the largest consumer of legal services in the U.S. (in the aggregate, what is estimated to be an \$80 billion annual market), and by the fact that corporations are the most powerful private actors in American society.

By "governance" we mean not only the rules that shape intra-organizational life (e.g., the governance of the large publicly held corporation understood to consist in a board of directors formally accountable to stockholders), but also those that govern inter-organizational dealings. Such rules can be furnished by the imperatives of market competition, the legal commands of the state, the requirements of membership in commercial associations, the bonds of community -- or, almost always, complex and shifting

combinations of all of the above. However provided, such rules furnish the conditions for social cooperation -- the prerequisites for social "order" as commonly understood.

Some measure of such cooperation and order are necessary even in the apparently anarchic world of commercial dealings. Even on the assumption of unrestrained competition among firms, corporations need to enter competition with their own production, marketing, and industrial relations systems already organized. This organization requires cooperation among actors (e.g., management and workers), and this typically requires rules limiting opportunistic behavior. Even perfectly competitive markets, moreover, require standing constraints on inter-firm dealings, constraints which, it should be emphasized, exceed the stipulations of voluntary private contracts. For as sociologists since Durkheim have pointed out, few if any of the basic commercial relations can be fully specified by contracts, and all contracts rely for their interpretation (let alone enforcement) on non-contractual understandings, norms, and relations of power.

More immediately, however, the assumption of unrestrained competition is grossly unrealistic. All competition, however robust, is in some measure overtly regulated and restrained by extra-market mechanisms. Some of the most visible such regulation come from the state. No existing market is "free" in the

classical sense, since all markets bear the imprint of state authority in setting prices, barriers of entry, labor protections, and product standards. As just noted, the state also plays an essential role in giving force to private contracts. And, even more fundamentally, the state constitutes the legal personality and resources of exchanging parties through its articulation of private and public rights.

Another source of regulation, however, is business firms themselves. Firms often "regulate" indirectly, through strategic use of state power. They force issues of legal interpretation and implementation, by bringing lawsuits against each other. Sometimes singly, sometimes in concert, firms also lobby for executive or legislative government action. Just as commonly, however, firms regulate themselves directly. In addition to promoting industry interests vis-a-vis the state and other commercial actors, commercial associations typically impose some obligations and standards of behavior on member firms. And even more commonly, competing firms enter into less formal agreements and understandings to assure that their competition is not ruinous. Wishing to avoid the collective irrationality of repeated price-cutting, firms reach informal agreements on prices (including, depending on the degree of labor organization, the price of labor). Wishing to develop markets, they agree on

industry-wide product specifications. Wishing to spread the risks of uncertain demand, they agree to share customers. Wishing to maintain stable relations with suppliers (even after unsatisfactory performance on some particular exchange), they accept informal promises of future performance in lieu of immediate satisfaction. This too is business governance in the inter-organizational sense.

The degree to which the non-market ordering of business dealings is achieved through law (again, commonly applied by business firms themselves), as opposed to other private mechanisms of governance, varies across industrial sectors and product markets. The essential reason for this is that sectoral differences in industry structure and market characteristics generate different collective action problems for firms, and different capacities and incentives in their solution. They thus affect the "demand" for state regulation -- either from firms within the sector that are its presumptive object, or from other actors (including, at least occasionally, state actors themselves).

As examples of these effects, consider the incidence of price and output collusion, or industry choice of wage-bargaining structures. Ceteris paribus, the likelihood of collusion (informal cartelization) can be expected to vary directly with

the height of barriers of entry to the market and inelasticity in demand for the product, and indirectly with the number of firms in the sector. High barriers and inelastic demand permit price increases unchecked by competition, while the greater the number of firms that need to be coordinated, the less the likelihood that free-rider problems will be solved. And ceteris paribus, the likelihood of single as against multi-employer bargaining can be expected to vary directly with the capital-intensity of the production process used, and the size and concentration of firms. The higher the capital intensity, the less sensitive firms will be to the price of labor, and the less willing they will be to surrender autonomy in the management of their own workforce to multi-employer association. The greater the degree of industry concentration, especially among large firms, the less the capacity of labor organizations to "whip-saw" individual firms in bargaining, and thus the weaker management's incentive to cooperate with rivals in a multi-employer association.

The state's competence, capacity, and regulatory style (whether, for example, it favors "command and control," "persuasion," or "incentive" techniques of regulation) also affect business calculations to demand or evade a state role in governance, since these characteristics affect the cost of regulation. Especially in the U.S. case of a highly fragmented

state apparatus, these calculations can also be expected to vary across sectors and policy domains.

Finally, it is a historic fact, especially prominent in the U.S., that the extent of labor organization varies across sectoral lines. As in the case of the state, the degree of labor organization, and the characteristic strategies undertaken by organized labor, affect the options and calculus of firms in ordering their competition.

We thus take the outcome that concerns us -- the mechanisms of governance in particular business sectors, and the varying role of law within them -- to be determined strategic calculations. These arise from the incentives facing business firms in particular relations of competition, and their capacities for "self-help" through the devising of private governance systems. Both the incentives and the capacities are shaped by industrial structure, by the resources available from (and particular strategies undertaken by) the state, and by the scope and strategy of relevant labor organizations. Our working model of business governance thus assumes strategic firm action in a political economy, with sectors as the basic frame of analysis.

The central goal of our project is to provide a description and explanation of the use of law in business governance in the

U.S., with attention to variation in that use over time and across sectors.

### **Changes in Business Governance and Use of Law**

What motivates this investigation is an apparent shift in the pattern of business organization and disputing, and a concomitant shift in the use of law within the American business community, evident since the early 1970s. Four sorts of evidence may be offered in support of this claim.

First, the sheer level of business consumption of legal services has dramatically increased. Firms use lawyers more, and business, as the pre-eminent consumer of legal talent, has increased its relative share of total U.S. consumption of legal services. Perhaps most striking here is the increased litigation of inter-firm commercial disputes, that is, the resort to "contractual" -- as opposed to what Macaulay (1963), writing a quarter-century years ago, called "non-contractual" -- mechanisms for resolving those disputes. Readier recourse to court is reflected in the fact that since 1970 contract actions, (not tort or civil rights actions, as commonly assumed) have become the largest category of civil cases in the federal courts. Filings of contract cases have increased more rapidly than tort cases. Most contract disputing in federal courts may be assumed to be

among relatively well-endowed players, preeminently business players. Much of the increase in contract filings, moreover, appears due to an increase in inter-firm disputes. Preliminary data, for example, suggest that the share of diversity contract cases identifiable as inter-corporate disputes enjoyed a spectacular four-fold increase from 1971 to 1986 (Galanter and Rogers, 1990).

These quantitative data are congruent with a wealth of more qualitative, anecdotal observation, revealed in the business press and in our own conversations with business figures. Throughout the American business community, we hear, firms are using law more often and more aggressively in their dealings with other firms. Indeed, we have yet to talk to a major corporate lawyer, in-house counsel, or business executive who did not think that the world of business dealings had become notably more litigious over the last two decades. Second, the content and structure of the legal services provided to corporations have undergone massive change. Whole new fields of practice have opened up, and to a degree almost wholly unanticipated a generation ago the economy of law practice has altered. Among the important developments are the increase in the cost of "outside" legal services, the consequent decision by many firms to internalize legal costs through the development of sophisticated

in-house legal departments, the weakening or outright collapse of exclusive retainer relationships between corporations and law firms, the response by law firms to add specialties and engage in far more aggressive marketing, the enormous growth in the size of the major corporate law firms, the progressive nationalization of corporate law practice, and the erosion of long-standing norms within the legal profession on inter-firm raiding of talent.

Third, and no doubt in part a response to both of these developments, there has been substantial growth in business use of "alternative dispute resolution" [ADR] techniques. Records of the American Arbitration Association, for example, show a 1,000 percent increase in the incidence of commercial arbitration since 1960, with most of the increase occurring since 1970. While there is little systematic longitudinal data on the use of other ADR services, scattered evidence indicates substantial growth here as well. Perhaps the best indicator of increased business use of ADR in recent years is an indirect one -- the proliferation of business-supported organizations specifically directed to promoting ADR as an alternative to costly litigation.

Fourth, there is much evidence of change in the internal organization of business corporations, and the organization of their relations with suppliers, customers, and competitors. As a general matter, increased competition in American business over

the last 15 years has seen more aggressive application of the cost-saving business maxim to "internalize scarcity, externalize risk." Corporations are subcontracting work out with greater frequency, and cutting their attachments to potentially redundant portions of their workforce. Recently, for example, the "contingent workforce" -- composed of temporary or part-time workers with which firms contract for discrete services -- has been growing at twice the rate of the civilian workforce. Inside firms, in addition to the widespread shedding layers of middle management, there are efforts to establish new lines of managerial authority organized along product rather than functional lines. Establishing distinct entrepreneurial centers ("intra-preneurs"), quasi-autonomous from top management, within large firms and spinning multiple independent divisions out of previously integrated operations are cognate management strategies. They are aimed at increasing accountability and flexibility in an increasingly competitive and unstable environment. Accompanying all these attempts to position firms better in an environment of increased instability and competition, however, is growing recognition of the need to establish "networks" or "commerical communities" among competitors to ease the strain of rivalry itself. Evident among a wide range of business actors -- from high-tech entrepreneurs

along Massachusetts' Route 128 to low-tech specialty clothing producers along New York's Seventh Avenue -- their purpose is to socialize risks across firms, while lowering the barriers to their sharing of market and product information, and even specific technologies, skills, capital, and labor. They are thus in part directed to reducing the sources of tension among firms that might generate disputes in the first place.

These different developments suggest great flux in the pattern of business governance, and the use of law in resolving governance problems. Taking the long view, the responses of the business community to a variety of economic forces that have disrupted previous governance arrangements thus far appears to take the form both of relying more heavily on extra-business governance mechanisms (preeminently, litigation) and of attempting to find new ways of securing private order.

### **Structure**

To describe and explain this transformation we have embarked on a series of inter-related projects that consider variations in business disputing and use of law at the level of the general economy, particular product sectors, and individual firms within those sectors. Although these projects address the separate issues of the organization of legal services to business

consumers (the "supply" side), the pattern of business disputing and demand for legal service (the "demand" side), and, cross-national variations in both, there is considerable "cross-lighting" among them. For example, supply-side features of law firm organization and capacity to deliver different sorts of legal services affect business demand for those services, as does the availability of "Alternative Dispute Resolution" [ADR] fora or service providers. The specific service requirements in particular sectors affect the structure of service providers catering to those sectors. The changes in the broad economic environment (internationalization, increased competition, etc.) to which corporate consumers of legal service are responding shape the options and strategies of legal service providers, and so on. Summaries of these projects follow.

#### The Transformation of the Large Law Firm

Concentrating on the growth and transformation of large corporate law firms, this project tracks changes in the organization of the delivery of legal services to business consumers. Working largely from archival sources we have accumulated a wealth of information on firm size and organization over time. Analysis of the available data has also led us to a theory of law firm governance that partially accounts for the patterns of accelerated growth characteristic of these

partnerships.

This theory, with clear debts to the economic literature on tournaments and transaction costs, centers on the intra-firm governance mechanism used by corporate firms to monitor and facilitate the sharing of human capital. Much of the large firm's organizational success stems from its ability to blend the assets of experienced partners with the labor of energetic junior lawyers. At the core of this governance structure is the promotion-to-partner tournament, whereby partners provide the incentives and security necessary to induce maximum effort and capital development from associates. We demonstrate that in addition to creating the desired work incentives, the tournament with its relatively constant promotion rates, also plants the seeds of exponential growth. Augmented by an increase in mergers between firms, this exponential growth reached "takeoff" in the early 1970s, since which time we have seen very large increases in the size of large corporate firms.

The exponential growth in the supply of lawyers in large firms, however, is not matched by like growth in the factors of production for those firms (law school graduates, particularly from elite schools) or the demand for legal services, and this generates a substantial economic problem for large firms. Law firms have responded to this problem by organizational and

product innovations. On their supply side, they have scoured the ranks of law graduates more aggressively to find adequate talent. They have also sought to slow down their internal growth machine by reducing the rate at which associates are promoted to equity partners (this is reflected in the proliferation of "non-equity partners," "permanent associates," and the like). On their demand side, they have pursued a mix of new product and marketing strategies toward consumers, including far more aggressive attempts to increase market share, and attempts to expand the market for legal services by generating new sorts of legal products to be offered to customers. Despite these efforts, however, the growth machine remains largely intact, and the economic problems it poses will not disappear anytime soon.

In conjunction with these economic problems, moreover, are a host of issues relating to the "quality of life" of practice in large firms. As firms grow in size, collegiality tends to erode. Increased market pressure (and increased commercial aggressiveness by firms undertaken in response to that pressure) also serves in natural ways to undermine collegial relations, while serving more directly to erode the autonomy and self-direction in work activity long considered part of the lawyer's professional ideal.

The results of Galanter and Palay's initial research in

changes in law firm practice, along with their theory of law firm growth, are reported in an article (1990) and a book, Tournament of Lawyers, the Transformation of the Large Law Firm to be published by the University of Chicago Press in the spring of 1991. In future work, Galanter and Palay intend to extend their analysis of governance arrangements and growth patterns to other sorts of law firm practice (boutiques, plaintiffs' firms, more "life-style" oriented firms) and to the organization of in-house corporate law departments, where the latter are understood both as an alternative form of practice and as a mechanism affecting the flow of business firm cases to outside law firms. They are also undertaking a comparison of the growth and transformation of large American law firms to that of large English solicitors' firms. They also plan to explore alternative and emerging forms of legal practice, including the evolution of "networks" of lawyers operating in cognate fields, or across sets of related cases. These studies will lead to consideration of the future of the large law firm, and rival forms of supplying legal services to business.

In addition to this extension of substantive concern, these law firm studies will be expanding in methodological range. Interviews and focus groups with lawyers and consumers of legal services are planned, both as a way of gathering new data on

governance and general organization, and as a way of gaining feedback from the groups being studied. This future work will overlap extensively with the second and third phases of the business disputing sub-project, described below, which also involve firm-specific investigations of disputing patterns, and interviews with business and legal personnel.

#### The Transformation of Business Disputing

The first paper reporting on this project (Galanter and Rogers, forthcoming) argues that the economic conditions for "non-contractual" business relations have eroded since the early 1970's. This erosion owes both to changes in the general environment of American business firms (internationalization, increased competitive pressures, sagging productivity and profit growth) and business strategies undertaken in light of those changes (more aggressive competitive strategies, "niche" production, increased subcontracting and other bids for flexibility, "paper entrepreneurialism" in finance). These developments, we argue, have altered the cost calculus of business firms regarding litigation. Increased competitive pressure and instability have led to steeper time discounts among firms, leading to a reduced assessment of the value of long-term relationships that might be disrupted by litigation. At the same time, those relationships themselves are disappearing from many

areas, with more dealings converging toward one-shot pairings of players, commonly with exceptionally high stakes in particular transactions. As a consequence of these changes, increased business use of litigation should be expected in settling contractual disputes.

This paper (Galanter and Rogers, forthcoming) presents a non-formal model of the determinants of business disputing. It first indicates the sorts of variables that appear to influence the litigation decision (i.e., the decision to litigate or not) at the firm level. It then ties the value of these variables to the structure of business governance mechanisms and the character of commercial dealings, and ties these, in turn, to changes in the macro economy. Examining such changes, it then offers a preliminary statistical analysis of changes in litigation, showing high correlation between the "litigation favoring" macroeconomic changes identified in the analysis and the actual incidence of litigation. Such an analysis is severely limited, as a host of potentially important variables intervene between the macroeconomic changes and the individual litigation decision. This acknowledged, the strength of correlation is impressive, and has encouraged us to move on to more micro-level investigations focusing on the litigation behavior of particular firms in specific sectoral settings. These micro-level investigations, in

turn, will proceed in three steps.

In phase one, we have joined forces with the RAND Corporation's Institute for Civil Justice (ICJ). Together we are conducting a study of litigation patterns among the 1,000 largest firms (manufacturing and service) in the U.S. over the period 1972-87. Using data from the Federal Court Data Base, this analysis examine cross-sectoral and longitudinal variations in the incidence of litigation among such firms. Formalization and testing of the model of business disputing (predicting the incidence of litigation from a range of independent variables that can be specified by sector) will follow this descriptive analysis. We hope to supplement this analysis of business disputing in the federal courts with some examination of the course of business disputing in the state courts.

In phase two, we will conduct a series of sectoral studies of business disputing and governance. The aim of these studies will be to construct mini-histories of disputing in a wide range of economic sectors, and to use the data gathered in these histories to refine and test a model of disputing. In addition to further quantitative analysis, we plan to enrich our account through extensive use of on-line commercial data sources, and interviewing of key actors, including both lawyers and business consumers of legal services. Macaulay and Rogers are currently

completing the first of these sectoral histories, which focuses on business disputing and shifting governance arrangements in the U.S. automobile industry. (Macaulay and Rogers, in progress) An additional study of the computer industry is also underway, and further studies, likely focusing on financial services, transportation, and metalworking, are anticipated.

In phase three, the project will focus more squarely on the key participants in litigation and other dispute resolution techniques, with detailed interviews with them about the decision to embrace or forego litigation in resolving disputes, and about litigation investments, strategies, and patterns of resolution in particular contexts. The idea here is to move to the level of individual firm organizational and other variables, the final ingredient in the litigation decision.

One component of phase three is a replication of Macaulay's (1963) earlier study of non-contractual dealings, being conducted by John Esser. His study will seek to substantiate, explain the correlations between levels of business disputing and types of business governance identified at the national and sectoral levels in phases one and two through case studies of business governance and business disputing at the firm and establishment levels. Subjects for these case studies will be the same fifty-plus Wisconsin manufacturing firms (or their successors) which

Macaulay originally studied for his 1963 article. In each case, practices governing producer/supplier transactions in 1990, including the use of business disputing, will be identified and compared with the governance practices used by the same manufacturer in the early 1960s. Changes in governance structures in business disputing will be noted, and explanations for these changes will be sought in intervening developments the firm has experienced in communications technology, production technology, competitive environment, institutional environment, and labor relations.

In combination, these different studies of business disputing and governance will integrate a wider variety of data and theoretical perspectives, and cover a much greater number of firms, than did Macaulay's original paper. When completed, the overall project should provide us with a useful economy-wide map of the incidence of litigation and non-litigious forms of dispute resolution, by sector and over time, in the United States. In addition to this description, we should have the rudiments of a testable theory of the determinants of business disputing, the determinants of the sorts of mechanisms businesses use to resolve disputes, and the variations in governance mechanisms and the use of law across the economic landscape.

The Transformation in Comparative Context

As yet least developed of our different projects, but of great interest to is, would be an attempt to situate the U.S. experience in a comparative frame. It is apparent that many of the changes in economic dealings that we hypothesize as significant in explaining increased litigation in the U.S. -- from changes in product markets to the declining capacities of state regulatory actors -- have been experienced in other countries as well. And it is apparent, at least at some superficial level, that the great economic restructuring now underway in Europe has encouraged, at least in some quarters, many of the same tendencies in law firm organization and operation observed in the U.S. On our own account, however, we would predict that the effects of changes would vary considerably across countries, and across sectors viewed in an international frame. How Germany responds to increased international competitive pressures, for example, would be expected to diverge from the U.S. response, given the very different pre-existing business governance relations in the two countries. And how the international pharmaceutical industry responds to new problems in intellectual property, given the pre-existing structure of that industry and the governance relations that obtain within it, we would expect to be different from international trade in, for example, machine parts.

As yet, however, there has been no systematic attempt to put changes in the supply and demand of legal services in a comparative frame, let alone one attentive to cross-sectoral, as well as cross-national, variations. One goal in reporting on our research in the pages of this journal is to gauge international interest in such an endeavor, to which we think we could make a contribution from the U.S.

### **Who Cares?**

As we embark on a large project of this magnitude, it is appropriate to ask about its relevance and importance. Why is such an inquiry worth pursuing? What hangs in the balance of its conclusions? Who cares, or who should, about the topic under view? For us, two sorts of concerns are paramount -- the first more clearly intellectual, the second more clearly practical.

### **Intellectual Concerns**

As an intellectual matter, we are dissatisfied with the present state of description and theorizing of business use of law. Despite the oceans of ink spilled on the subject of commercial litigation, ADR, and business networking, we lack both a comprehensive description of what is "going on out there" and, a fortiori, any theory to order, explain, and truly evaluate these diverse phenomena. Why do firms litigate? What determines the rate of litigation? What variables account for changes in the

consumption of legal services across time, and across different parts of the economy? What conditions favor the resolution of disputes through litigation, or through ADR or informal adjustment? How important are industry structure variables in producing different governance regimes, as compared to intra-firm organizational variables, or the simple preferences of key actors? How efficient are different dispute resolution techniques? How attractive are they normatively? These are the sorts of basic questions a theory of business use of law would attempt to answer. But we now have neither anything approaching such a theory, nor an adequate description of what it would be a theory of. This is simply a huge gap in the present body of knowledge about our society.

This project will not fill that gap entirely, but it should make considerable progress on both the descriptive and theoretical fronts. From the standpoint of theory-building, we find it promising that the transformation in disputing just described is relatively recent. Reasonably good data exist or can be generated regarding patterns of disputing before the onset of the transformation, thus permitting the "before" and "after" comparison helpful in locating the dynamics of change. And promising for both theory and description is the recent explosion in the amount and quality of data on commercial dealings. Salient

here (and incorporated in our research design) is the development of a Federal Courts Data Base on litigation, the development of such commercial data bases as LEXIS and Nexis, and the more general increase in the scope of reporting on business and commercial lawyering reflected in the expanding business and legal press.

Recent work in several disciplines, thus far insufficiently incorporated in the study of law, also promise aid in this effort. In particular, we note the wave of recent scholarship -- in political economy, industrial organization, game theory, and institutional economics -- that has made important contributions to understanding the problems of business governance, and the economic foundations of their successful solution. Our work will link existing scholarship in disputing to these broader currents of recent social science analysis, and in doing so enrich the disputing literature.

The obvious contribution will be to our understanding of business disputes. With the aid of the several literatures referred to above, these can be located in a much more sharply defined empirical context (e.g., industrial and market structure), about which something is already known. With the aid of models of firm behavior developed in other contexts, we can press our own particular variables into sharper focus, and build

and test more deductive models of business disputing than now exist, with clearer microfoundations (i.e., the elements necessary for an intentional explanation of behavior). In addition, however, since we do not regard the dynamics of business disputing are inherently different than the disputing of other strategic organizations or individuals, we expect our findings will make a contribution to the theories of disputing and dispute resolution at the most general level.

We are also bold enough to think that the literatures just cited can themselves be enriched and sharpened by better appreciation of the function of legal rules in shaping the environment for strategic action, and the interests pursued by actors. How law does that -- by allocating risks, distributing costs, harnessing private incentives to the achievement of public ends, making authoritative declarations of moral value -- is broadly familiar to lawyers and others who work closely with the legal system (albeit seldom understood in detail, let alone systematically). It is somewhat less familiar, we think, to most theorists in these other literatures, and that is reflected in their work, which can be strengthened by closer attention to the varying use and effects of legal rules.

Thus as an intellectual matter, we think the investigation will be important for three basic reasons. It will provide a much

richer and more comprehensive description than now exists of of "what is out there." It will advance our theoretical understanding of business disputing, and disputing generally, through the construction of tighter models of disputing than now exist. It will enrich the emerging scholarly literature on governance, both by bringing the literatures on political economy and institutional economics to bear on issues of litigation and ADR, and by challenging those literatures themselves to account for the observed effect of legal rules.

#### Practical Concerns

Most intellectual projects are pursued because of certain more practical interests, and ours is no different. The transformation of business disputing has raised several concerns about the current and appropriate role of law and lawyers in the United States. Believing that these concerns are worth addressing, we are impressed with how little practical guidance on their address is provided by existing work, and wish to do something to remedy this.

Three concerns seem most prominent.

First, and certainly best known, are a variety of economic concerns. These range from worry over large and growing expenditures on the apparently "deadweight" costs of legal contention, to the difficulties of improving economic performance

in a highly rigidified "rights-based" universe of social dealing. Whatever their particular object of attack, economic critics of the present system are asking the same basic question -- Is this the most efficient system of social organization we can imagine, the one that produces the greatest material well-being given available inputs? They usually conclude, more often implicitly than explicitly, that the present organization of business disputing comes up short in some way, and that this owes in part to the excessively "litigious" character of American society. Underscoring such worries is the fact that the transformation in business disputing that provides our object is roughly coextensive with a period of sagging productivity growth, record low levels of public and private investment, and continued decline in U.S. competitiveness in international markets.

Second, and relatedly, there are concerns about the corrosive effect of aggressive litigation on the quality of American life. At only slight risk of caricature, the popular image of the present period is one in which everybody is suing everybody all the time; the virtues of compromise, adjustment, and stable continuing relationships are being lost; social cooperation is giving way to morally unattractive sauve qui peut practices; and community, always an imperfectly realized ideal, is being lost. Needless to say, this is a very old issue in

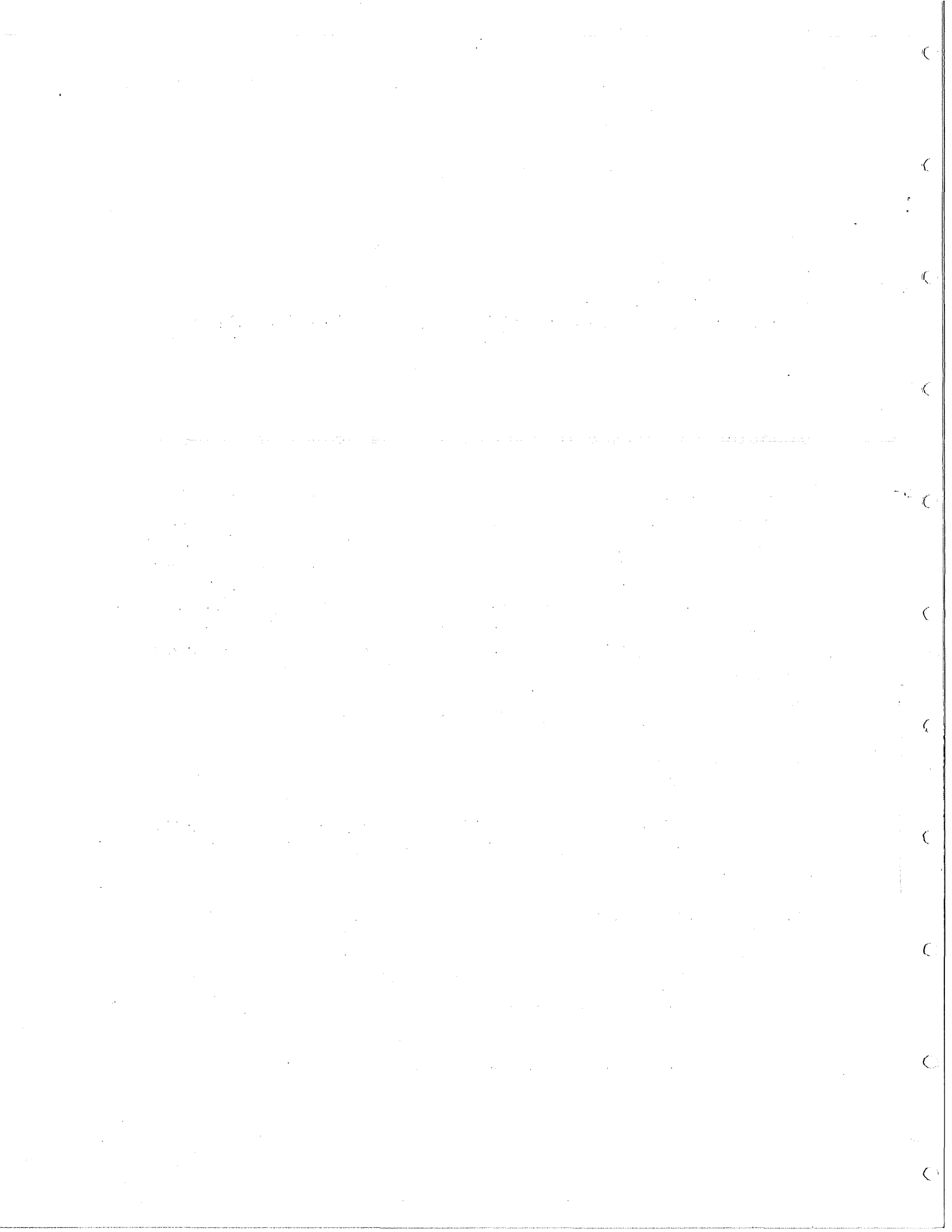
American culture, and this is not the first time that the operations of business, or business lawyers, have been found to threaten social harmony. Still, the dissatisfaction is apparent.

Third, there are doubts even in the narrower but not inconsequential arenas occupied by lawyers themselves. They widely perceive the practice of legal "professionalism," to be threatened as its requisite conditions -- detachment of lawyer welfare from the interests of particular clients and from the imperatives of market competition -- erode. The growth of very large law firms, and related changes in their internal governance and relations with other firms, is widely held to be productive of unsatisfying work relations. As a consequence, if the material rewards of legal practice remain apparent (even first year associates at top corporate firms are now paid more than most doctors, engineers, professors, or judges), the more subtle civic and moral rewards often associated with professional practice, and the collegiality and autonomy in work that makes it satisfying, are considered much less so. From television soap operas like L.A. Law (avidly watched by droves of young lawyers), to presidential addresses at Harvard (by former Harvard Law School deans), to the American Bar Association's initiatives in the area of professional responsibility, the image of lawyers as amoral "hired guns" finds renewed verification (sometimes

reluctant, sometime gleeful) and calls for reform from within the legal profession. In brief, there is among lawyers a diffuse but palpable sense that something is awry in the present world of legal practice.

It may be that all these public concerns are ill-founded. It may be that increased resort to legal resolution of disputes (either directly through litigation, or in the "shadow of the law") is the most efficient way of resolving legitimate private conflicts. Or it may be that the increased propensity of business disputing to take a distinctly litigious turn is inefficient, but transient, of little concern in the longer run. It may be that the organizational changes in law firm practice will reach some natural terminus, within which the professionalism, workplace, and other sorts of concerns will be adequately addressed. All of this may be, in short, much ado about nothing, or very little.

Or it may not. The fact is, we simply do not know a great deal either about the determinants of business use of law, or the organization of corporate-centered legal practice. Lacking even an adequate description of these things, we are naturally ill-prepared to evaluate their efficiency, normative appeal, relation to received understandings of the actual or desired role of law and lawyers, or likely future evolution. We are even less prepared to contemplate alternative and more satisfying



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